

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

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UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	Civil Action No. 99-CV-2496 (GK)
v.)	
)	Next Scheduled Appearance:
PHILIP MORRIS, INC., <u>et al.</u> ,)	July 20, 2001 at 9:30 a.m.
)	
Defendants.)	
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ORDER # 51

NINTH CASE MANAGEMENT ORDER

On December 22, 2000, this Court entered Order #41, appointing a Special Master (the Honorable Richard A. Levie (Ret.)), and assigning him the following responsibilities: development of a comprehensive detailed case management plan, and development of a procedure for resolving discovery and privilege disputes.

Acting with commendable dispatch, the Special Master submitted his Report and Recommendations on February 26, 2001. That Report, with its introductory section of 18 pages, totaled 170 pages; the order proposed by the Special Master, to implement his Recommendations, was 60 pages long.

The Special Master's Report makes clear that he had innumerable in-person and telephonic conferences with the parties; moreover, it is also clear that he waded through hundreds and hundreds of pages of written and electronic submissions from the parties.

This Court has now spent many, many hours digesting the Special Master's Report, weighing the positions of the parties regarding the manner in which the case will be litigated in the next two and a quarter years, and making some significant revisions to the order proposed by the Special Master.

Those revisions are designed to remedy, at least to some degree, the unproductive manner in which the parties chose to address many issues presented to the Special Master. It is clear from his comprehensive Report that the parties have complicated and over-lawyered the case management issues to such a degree that they have lost all sight of the over-arching goal—namely the need to be prepared for trial on July 15, 2003. Many of the positions they have advocated have been either impractical, unwieldy, or in one or two instances, just plain foolish. The Court cannot emphasize too strongly that resolution of this litigation will not be derailed because counsel are focusing their energies on minor side issues or needlessly wasting the Court's time and energies.

There is an enormous amount of work to be completed to get this case trial-ready. To achieve that goal, the Court has made many changes to the proposed case management order, all of which are designed to streamline procedures, to reduce time frames and page limits so as to force counsel to focus on the real issues rather than generate reams of briefs, and to ensure a steady and inter-related flow of work from counsel to the Special Master to the Court.

Among the most significant changes are the following:

- the Court will hold regular quarterly status conferences;
- all motions requesting immediate decision by the Court rather than by the Special Master on “controlling issues of law” will go to the Special Master first; he will issue a brief recommendation to the Court on an expedited basis, and there will be no stay of matters before the Special Master pending the Court’s ruling;
- the authenticity procedure has been simplified in that no challenge may be raised to documents deemed authentic and challenges to documents presumed authentic can be made only under certain circumstances;
- the parties’ ability to assert privilege as to Bliley documents has been narrowed;
- written discovery is to be substantially completed by December 1, 2001;
- time and page limits have been reduced in numerous instances;
- the government is required to make space and outlets available at Federal Records Centers and allow copying by personnel or agents of the Defendants;
- provision for destruction of Bliley documents has been removed;
- all days referred to in the Order are calendar days;

- parties seeking to prevent deposition testimony must certify that they have turned over all previous testimony in related cases of that deponent; and
- the Special Master is given authority to recommend sanctions for dilatory tactics, frivolous motions/arguments, or for otherwise violating the terms and/or spirit of this Order.

Wherefore, it is this _____ day of March 2001, hereby

ORDERED, that the following comprehensive case management order shall govern this case:

I. Preliminary Matters

A. Prior Case Management Orders.

The primary orders that have governed case management to date in this matter are Order #1 (First Case Management Order for Initial Scheduling Conference), entered October 19, 1999; Order #2 (Second Case Management Order), entered November 22, 1999; Order #6 (Sixth Case Management Order), entered February 22, 2000; Order #7 (Protective Order Governing Confidential Information), entered March 3, 2000; Order #14 (Seventh Case Management Order), entered August 14, 2000; Order #16, entered October 12, 2000; Order #36 (Addendum to Protective Order for Highly Confidential Information), entered November 15, 2000; Order #37 (Eighth Case Management Order Setting Pre-Trial Schedule), entered

November 17, 2000; Order #41 (Order Appointing the Special Master), entered December 22, 2000; and Order #45 (Preservation of Privileges), entered February 5, 2001.

B. Powers Conferred Upon the Special Master

To the extent that this Order grants the Special Master duties, responsibilities or powers not delineated in Order #41, such duties, responsibilities or powers are hereby granted.

C. Scope of Order

This Order, in conjunction with others previously entered, shall govern discovery and all other pre-trial activity until further order of the Court. This Order does not affect or modify the parties' respective rights and obligations under the Court's Seventh Case Management Order (Order # 14) regarding the schedule for objecting and responding to Preliminary Requests and Comprehensive Requests for production of documents, or under the Court's Eighth Case Management Order (Order #37) setting a pre-trial schedule. Documents filed with the Special Master pursuant to this Order shall be filed with the Court in compliance with LCvR 5.1 and the provisions of this Order relating to the handling of documents and transcripts (or portions thereof) filed under seal.

D. Modification of Dates

Consistent with Order #37, the scope and timing of discovery reflected in this Order is predicated on the current status of the (original) complaint, that is, as modified by (1) the Court's Memorandum Opinion and Order of September 28, 2000, dismissing Counts I and II of Plaintiff's complaint, and (2) the Court's Memorandum Opinion and Order of January 31, 2001, denying Plaintiff's Motion to Modify. Should any party obtain interlocutory or other relief from that ruling, the dates and restrictions on discovery set forth in this Order shall be subject to modification to reflect the impact of such relief. In the event that any portion of Counts I and II are reinstated, the parties shall meet and confer with the Special Master within thirty (30) days after entry of the Order reinstating such claims to discuss the modifications proposed by the parties regarding the scope and timing of discovery set forth in this Order and Order #37, and shall submit their joint or separate provisions and memoranda to the Special Master no later than forty-five (45) days after entry of the Order reinstating such claims. The Special Master shall then make recommendations to the Court regarding modification of this Order and Order # 37.

E. Quarterly Status Conferences with the Court

The Court will hold a status conference every three months, the first of which shall be held on **July 20, 2001 at 9:30 a.m.** No later than five (5)

days prior to the status conference, the Plaintiff and Defendants shall exchange proposed agendas for the conference and serve the agendas on the Special Master. No later than two (2) days prior to the status conference, designated counsel for plaintiff and defendants shall confer, by telephone or in person, regarding the agenda items in an effort to resolve or narrow disputes. Immediately thereafter, the parties shall inform the Court and the Special Master of any modifications to their respective agendas. Should the Special Master have any issues for the agenda, he shall forward them to the parties and the Court at least two (2) days prior to the status conference.

F. Meetings with the Special Master Regarding Specific Matters

1. Expert Discovery

No later than May 15, 2001, the parties shall exchange proposals regarding the timing and manner of expert discovery, including expert reports and a provision for rebuttal experts. The parties shall meet and confer with the Special Master regarding expert discovery proposals no later than May 31, 2001. No later than June 8, 2001, the parties shall submit to the Special Master a proposed Order governing expert discovery in this matter, consistent with Order #41. To the extent there are any disputes, the Special Master may establish a briefing schedule consistent with this Order.

2. Exhibit Lists, List of Witnesses, Deposition Testimony to be Used at Trial, Motions in Limine, and Other Pre-Trial Matters

No later than August 1, 2002, the parties shall meet and confer to discuss protocols for the designation of Exhibit Lists, Lists of Witnesses, Deposition Testimony to be used at trial, Motions in Limine and other pre-trial matters. No later than September 4, 2002, the parties shall submit to the Special Master a proposed Order setting forth protocols for the designation of Exhibit Lists, Lists of Witnesses, Deposition Testimony to be used at trial, Motions in Limine, and other pretrial matters.

G. Communications With the Court or the Special Master

There shall be no *ex parte* communications with the Court or the Special Master, except for purposes of contacting administrative personnel for scheduling matters, or as otherwise set forth in this Order, or for purposes of asserting a privilege dispute pursuant to ¶ II.C.3 herein.

H. Service

All papers required to be served under this Order shall be served in accordance with the Federal Rules of Civil Procedure, the Local Civil Rules of the United States District Court for the District of Columbia and prior orders of the Court in this case, unless otherwise provided herein. Papers

required to be served on counsel and the Special Master may be served by electronic transmission in addition to other required manners of service.

I. Computation of Time

With respect to the computation of time for acts required under this Order, Fed. R. Civ. P. 6(a) shall apply, except that when the period of time prescribed or allowed is less than 11 days, intermediate Saturday, Sundays, and legal holidays shall be *included* in the computation; Fed. R. Civ. P. 6(e) shall not apply.

II. Procedures for Resolution of Discovery and Privilege Disputes

A. Substantive Issues of Law

Nothing set forth in this Case Management Order shall be deemed to affect any substantive right, claim or defense of any party to this case, or constitute any ruling or order on any question of law.

B. General Procedures for Resolution of Discovery and Privilege Disputes

1. Monthly Conferences

(a) The Special Master shall hold monthly formal status conferences on the second Tuesday of each month, unless otherwise ordered by the Special Master. The general purpose of these status conferences is to provide a forum for the parties to discuss discovery activity since the last meeting, to discuss planned discovery

activities for the coming month, to discuss anticipated discovery problems likely to arise in the coming month, to review the overall status of discovery in the context of Order #37 and this Order, to discuss specific or systemic matters that may enhance or limit the parties' ability to complete discovery within the limits of Order #37 and this Order, and to discuss such other matters as scheduled by the Special Master.

(b) Status conferences may be conducted in-person or via telephone. No later than five (5) days prior to the monthly status conference, the Plaintiff and Defendants shall exchange proposed agendas for the conference and serve the agendas on the Special Master. Each proposed agenda item must include: (a) a brief description of the issue, (b) the efforts to resolve the issue, and (c) the potential relief (if any) that may be sought in the future by a party listing the agenda item. No later than two (2) days prior to the monthly status conference, designated counsel for plaintiff and defendants shall confer, by telephone or in person, regarding the agenda items in an effort to resolve or narrow disputes. Should the Special Master have any issues for the agenda, he shall forward them to the parties at least two days prior to the conference between counsel. Absent a showing of good cause, the Special Master shall

not permit discussion of matters not placed on the proposed agenda pursuant to these procedures.

(c) The status conferences shall be transcribed. The costs of transcribing the status conference shall be borne by the parties in the same manner as compensation for the Special Master pursuant to paragraph 4 of the Court's December 22, 2000 Order (Order #41).

2. Meet and Confer Requirements

Prior to filing any motion seeking relief in connection with a discovery or privilege dispute, the party intending to seek relief shall initiate a "meet and confer" session in accordance with LCvR 7.1(m). In the event that the meet and confer session does not solve the outstanding issues, the party seeking relief may file a motion in accordance with the procedures set forth in ¶ II.B.4 below.

3. Controlling Issues of Law

(a) At the meet and confer, the parties shall discuss whether the matter involves an important controlling issue of law that should be resolved in the first instance by the Court, pursuant to the Court's December 22, 2000 Order Appointing the Special Master (Order #41).

(b) A party seeking initial judicial consideration with respect to a "controlling issue of law" relating to a discovery or privilege dispute

(hereinafter “dispute motion”) shall file with the Special Master and the Court, and serve upon opposing counsel, a motion (hereinafter “issues motion”), not to exceed five (5) pages, setting forth the asserted controlling issue(s) of law and the reason(s) why the Court, rather than the Special Master, should determine such issue(s) in the first instance. Any party opposing the issues motion shall file a response, not to exceed five (5) pages, to the issues motion within five (5) days of service of the issues motion. In an issues motion and any opposition thereto, neither the moving party nor the opposing party shall argue the substance of the asserted dispute motion.

(c) If the party filing the dispute motion seeks initial judicial consideration, the issues motion shall be filed and served simultaneously with the dispute motion. If the party opposing the dispute motion seeks initial judicial consideration, that party’s issues motion shall be filed no later than the filing of the response to the dispute motion; the party filing the dispute motion shall then have five (5) days to file a response, not to exceed five (5) pages, to the issues motion.

(d) As soon as an issues motion is ripe for review by the Special Master (for a contested motion, upon receipt of the opposition, and for a consent motion, upon receipt of the motion), the Special Master

shall begin considering it. The Special Master shall submit, preferably within 48 hours, a recommendation to the Court, generally not to exceed one page, on disposition of the issues motion. Upon receipt of the recommendation, any party may file, within one (1) day, an objection to the recommendation, not to exceed five (5) pages; the party shall attach to its objection a copy of the issues motion and all responses thereto. Upon receipt of the Special Master's recommendation and any objections thereto, the Court shall rule on the issues motion as expeditiously as possible. The service and filing of an issues motion shall not stay the Special Master's consideration of the underlying dispute motion. In the event that the Court grants the issues motion, the Special Master shall immediately cease consideration of the underlying dispute motion, pending further Order of the Court.

4. Motions Practice

(a) The party seeking relief may file a motion for relief (*e.g.*, a motion to compel or a motion for protective order) and supporting papers with the Special Master and serve counsel of record.

(b) The party against whom relief is sought may file a written response within ten (10) days from the date the discovery motion was served. Where the motion concerns a challenge to a privilege

dispute, the party asserting the privilege shall file a response within twenty (20) days.

(c) The moving party may file and serve a reply no later than five (5) days from the date the response was served. Where the motion at issue is a challenge to the assertion of a privilege, the moving party may file a reply no later than seven (7) days after the response was served.

(d) For motions concerning privilege disputes, the memoranda in support of the motion and opposition each may not exceed twenty (20) pages in length; the reply memorandum may not exceed ten (10) pages. For all other motions, the memorandum in support of the motion and opposition each may not exceed fifteen (15) pages in length; the reply memorandum may not exceed five (5) pages. These page limits do not apply to attachments used to support or illustrate an argument or to transmit pertinent cases. These page limitations do not apply to document-by-document defenses, challenged privileged documents and/or supporting materials.

(e) If any party believes it needs additional time and/or additional pages to brief any matters governed by these procedures, the parties may stipulate to such an addition and provide notice to the Special Master. If the parties cannot agree, the party seeking additional time

or pages may seek leave from the Special Master under procedures developed by the Special Master. In no event may the parties stipulate to a page limit extension of more than five (5) pages or additional time of more than three (3) days without the express approval of the Special Master.

5. Oral argument

With respect to discovery and privilege disputes, any party to a motion may request oral argument before the Special Master. A request for oral argument shall be made by the moving party when the motion for relief is first filed and served or by the responding party when the response to the motion is filed and served. While the Special Master may, in his discretion, allow oral argument on the issue(s) in dispute, it is anticipated that oral argument will be the exception, not the rule. Oral arguments before the Special Master shall be transcribed at the parties' expense in the same manner as compensation for the Special Master, pursuant to paragraph 4 of the Court's December 22, 2000 Order (Order #41).

6. Teleconferences

(a) If available, the Special Master may entertain a request from one or more parties for an immediate, or otherwise scheduled, emergency teleconference in connection with a discovery or

privilege dispute. The Special Master shall issue an oral recommendation resolving the dispute.

(b) In the event of an objection to the Special Master's oral recommendation, the party or parties shall state the reasons for the objection for the record, if a stenographic reporter is available, or, if a stenographic reporter is not available, fax such reasons in writing to the Special Master within two hours of the recommendation or such other time as may be set by the Special Master. If the Court is unavailable to consider the objection to such oral recommendation of the Special Master on an emergency basis or for any other reason takes no action on an emergency objection, the parties shall proceed to complete the deposition or event in the most efficient and cost-effective method, consistent with the Federal Rules of Civil Procedure and with due regard for the convenience of all counsel, parties and deponents.

C. Specific Procedures Relating to Privilege Challenges

1. Privilege Challenges Generally

(a) Each side may seek to challenge the assertion of privilege of up to five hundred (500) documents per thirty (30) day period; provided, however, that no one Defendant shall be required to respond to more than 250 challenges to asserted privileges within a

thirty (30) day period. The Special Master may, in his discretion, modify the number of challenges a party can make each month, as circumstances dictate.

(b) For purposes of facilitating resolution of privilege disputes, the parties, after meeting and conferring, shall present to the Special Master no later than two (2) weeks after entry of this Order proposals for establishing categories into which allegedly privileged documents may be grouped for review and determination of the validity of privilege claims or exceptions thereto. Nothing in this provision shall limit any party from subsequently submitting to the Special Master additional suggestions for proper categorization of privilege challenges, based upon timely review of submitted privilege logs.

(c) Prior to filing a motion for relief with the Special Master with respect to challenging an assertion of privilege, the parties shall meet and confer in good faith, in accordance with LCvR 7.1(m), with respect to the assertion of privilege. The party challenging the assertion shall submit to the party asserting the privilege its list of the document identification numbers of the documents or categories of documents being challenged (no more than 500 or 250 per Defendant in a 30 day period) and the party's reason for the

challenge no later than five (5) days prior to the meet and confer.

The challenged documents shall be those that the challenging party

(a) has a reasonable, good faith belief are not appropriately privileged, and (b) expects to use as a trial exhibit, as an exhibit to a dispositive motion, or in a deposition.

(d) If, after the meet and confer, there remain unresolved privilege disputes, the challenging parties may, within ten (10) days following the meet and confer, file and serve upon the Special Master and all parties, a motion for relief in accordance with the procedures set forth in ¶ II.B. above and the procedures set forth in ¶ II.C.2 and ¶ II.C.3 below.

2. Challenges to Assertions of Privilege and Exceptions to Assertions of Privilege

(a) The party challenging the privilege assertion shall indicate in its memorandum to the Special Master the document identification number of the challenged documents, the identity of the party asserting the privilege, and the legal and factual bases on which the party believes that the document is not privileged. The party alternatively shall argue, in the event that the Special Master finds that the document(s) are privileged, the factual and legal bases for any exceptions to privilege that the party in good faith believes

apply. The party shall include any submissions or other evidentiary showing necessary to support its arguments. If the party does not argue exceptions to privilege at this time, the party shall be deemed to have waived the arguments, unless it can show good cause for not raising the issue in the motion.

(b) The party asserting the privilege shall, in its response and accompanying memorandum, indicate the factual and legal bases that justify the assertion of the privilege. The party shall also set forth the factual and legal bases on which it argues that the exceptions claimed by the moving party are inapplicable to the assertion of privilege. The party shall include any submissions or other evidentiary material necessary to support its arguments.

3. *In Camera* and *Ex Parte* Filings

The Special Master and Court shall allow motions, oppositions, replies, supporting memoranda, affidavits and other submissions to be submitted *ex parte* and *in camera*, as necessary, to maintain any claims of privilege. At any hearing required or authorized by the Order, the party asserting the privilege shall be provided an opportunity to present submissions and argument *ex parte* and *in camera* as necessary to protect its claims of privilege. Any *ex parte* hearings regarding privilege shall be transcribed and the transcript

shall be sealed and made available only to the Special Master, the Court and the party presenting such argument and submissions. Any *ex parte*, *in camera* filings and copies of transcripts of *ex parte* hearings made available to the Special Master or Court shall be indexed and held under seal by the Clerk of Court. Any filing pursuant to this provision may be done without the necessity of obtaining a Court order, pursuant to LCvR 5.1(j)(1). Pursuant to a subsequent Order of the Court, the Special Master shall have access to such materials during normal business hours.

4. Use of Publicly Available Documents, As to Which Privilege is Claimed, in Depositions

(a) This subsection shall apply to documents that are publicly available in the Minnesota Document Depository or that have been placed on the Internet by the Commerce Committee of the United States House of Representatives (also known as the “Bliley” documents) [hereinafter cited as 4(a) documents] and as to which a Defendant or Defendants continue(s) to assert a privilege.

(b) All parties shall make every effort to resolve privilege disputes regarding 4(a) documents prior to their use at depositions or other proceedings.

(c) With respect to the Bliley documents, a motion arguing waiver of privilege shall be promptly filed with the Court. The memorandum in support of the motion shall identify the legal and factual basis for the good faith belief that privilege has been waived as to the Bliley documents, and shall include any submissions or other evidentiary showing necessary to support the arguments. The United States may argue waiver of privilege for the Bliley documents without relinquishing its right to argue exceptions to privilege (*e.g.*, crime-fraud) for all or some of these documents at a later time should that be necessary.

(d) In the event that a party desires to use a 4(a) document as to which it has a pending motion for relief before the Court or the Special Master, the deposing party may make inquiries of a deponent regarding the document. The party asserting the privilege may object, the objection shall be recorded by the court reporter, and the witness shall answer the question. No privilege objection shall be interposed when a questioner inquires about non-privileged topics, such as: who authored a document, when it was authored, when and from whom the author obtained the information reflected in the document, how such information was communicated, who else was present when the communication took place, and to whom the

document was circulated (at any point in time); provided, however, that a party may assert a privilege objection when a question requires a witness to reveal the substance of a privileged communication. The portions of the deposition addressing the privileged matters or documents subject to claims of privilege shall be sealed and made available only to counsel for the parties, the Special Master and the Court until further order of the Special Master or the Court. Any use of the document in the deposition or otherwise does not constitute a waiver of an asserted privilege or of the rights of any party.

5. Use of Publicly Available Documents, As to Which Privilege is Claimed, in Other Proceedings

(a) In the event that a party chooses to use a 4(a) document in a proceeding before the Court or the Special Master prior to the resolution of any privilege dispute concerning such document, any motion or memorandum (or portion thereof) relating to such document shall be filed with the Court under seal.

(b) If the Court or the Special Master resolves the privilege dispute in favor of the party asserting the privilege, the documents shall remain sealed and the challenging party shall be prohibited from using the document or information contained therein in future proceedings.

(c) If the Court or the Special Master resolves the privilege dispute in favor of the challenging party, the documents shall remain sealed pending any appeal of the privilege ruling.

D. Reports and Recommendations

1. Any final report and recommendation of the Special Master issued pursuant to the procedures set forth in this Order shall become effective five (5) days after it is filed with the Court and served upon the parties, unless any party files objections with the Court. The provisions of this Section do not apply to Special Master recommendations issued under ¶ II.B.3 of this Order.

2. Objections shall be asserted and briefed on the following time schedule and with the following page limitations:

(a) Within five (5) days of the filing and service of the Special Master's final report and recommendation, any party with an objection shall file a Notice of Objection with the Court and serve it upon the parties and the Special Master. At the same time, the objecting party shall file a memorandum, not to exceed fifteen (15) pages, setting forth the grounds upon which it contends that the Special Master's report should be modified or rejected.

(b) The party opposing modification or rejection of the Special Master's report shall file a responsive memorandum not to exceed fifteen (15) pages no later than five (5) days after service of the objecting party's memorandum.

(c) The objecting party may submit a reply memorandum not to exceed five (5) pages no later than three (3) days after service of the responsive memorandum.

3. To the extent that the Special Master's final recommendation and report reveals or discusses privileged information not otherwise available to all of the parties, the Special Master shall provide a redacted copy of the final report and recommendation to all parties, and a non-redacted version to the party or parties whose privileged information is revealed. The non-redacted copy shall be filed under seal with the Clerk of Court and the redacted copy shall be filed in the public file with the Clerk of Court.

4. The disclosure of any information in any report, recommendation, finding of fact, conclusion of law or order of the Special Master or Court shall not waive any claim of privilege. Any *ex parte*, *in camera* submission regarding the challenged documents, including additional materials or information subject to privilege claims, to the Special Master shall not be deemed a waiver of any

claim of privilege or confidentiality, nor in any way diminish or extinguish any privilege, protection, or right against disclosure or production that otherwise exists. Such documents, information contained within the documents, and statements by counsel regarding the content of the documents shall be confidential and under seal and shall not be disclosed to any party other than the party submitting the materials or the Court, except upon further order of the Special Master or the Court.

5. In the event of an objection to a Special Master's report and recommendation, the parties may refer to the matters in the record before the Special Master, and such materials shall be made available to the Court for its review consistent with ¶¶ II.D.3-5 above including, as appropriate, *in camera* and *ex parte* materials, which shall be filed under seal. Evidentiary materials not previously submitted to the Special Master may be submitted only on good cause shown. While the parties may request oral argument in the Notice of Objection or in the responsive papers, it is anticipated that oral argument will be the exception, not the rule.

6. Any transcripts of proceedings before the Special Master necessary for review by the Court shall be prepared and transmitted at the parties' expense in the same manner as compensation for the

Special Master, pursuant to paragraph 4 of the Court's December 22, 2000 Order (Order #41).

III. Fact Discovery

A. Production of All Documents Created Prior to January 1, 2001

The parties shall produce all responsive documents not subject to objection in their possession, custody or control, dated or created prior to January 1, 2001.

1. Supplementation of Discovery Responses

In accordance with Fed. R. Civ. P. 26(e), the parties shall meet on or before September 1, 2001 to discuss the issue of supplementation of document discovery responses, including but not limited to, the supplementation of document responses for documents created after the presumptive cutoff date of January 1, 2001. The parties shall submit a proposed Joint Order to the Special Master no later than September 15, 2001 regarding procedures for supplementation, or failing agreement, shall submit statements not exceeding ten (10) pages to the Special Master regarding their respective positions no later than September 15, 2001. In either event, the Special Master shall provide the Court with a report and recommendation regarding procedures for supplementation of document discovery responses no later than October 1, 2001.

B. Cutoff Date for Promulgation of Written Discovery

The cut-off date of December 1, 2001 for written discovery contained in Order #37 ¶1 refers to the final date for propounding requests for written discovery. All parties shall substantially complete document production in response to the Comprehensive Requests for Production of Documents no later than December 1, 2001. All parties shall complete document production in response to any subsequently served Fed. R. Civ. P. 34 request for production within 60 days of service of the request. Thus, all document production shall be completed by February 1, 2002. All parties shall produce documents on a rolling basis when they are available to be produced, and no party shall construe this provision as permitting production to be delayed until the date upon which substantial completion is required.

C. Deposition Protocols

1. Consultation and scheduling

(a) Each party and each side shall designate one person to act as liaison for coordination of the scheduling of depositions.

(b) Absent extraordinary circumstances, at least thirty (30) days in advance of a proposed deposition, an attorney or designated representative for the party wishing to take a deposition shall initiate the consultation process with the liaison person for the party

involved and, in the case of a non-party deponent, with counsel for the non-party deponent and liaison counsel for the other side. It shall be the responsibility of an attorney for the Defendant, as the noticing or defending party, to consult with counsel for the other Defendants. The consultation process shall be for the purpose of scheduling the deposition at a mutually convenient time and place and of discussing the estimated length of the deposition.

(c) Once the attorneys for the noticing and defending parties and, where appropriate, the attorney for the non-party deponent have resolved scheduling details, the noticing attorney and the attorney for the deponent shall notify their respective side's liaison representative. In the case of a non-party deponent, the noticing attorney shall notify the liaison representative for the other side.

(d) If the parties and, where appropriate, the attorney for the non-party deponent are unable to resolve scheduling details, the noticing party may issue a Rule 30 notice in accordance with Fed. R. Civ. P. 30 and ¶ II.C.2 herein.

2. Notice

Pursuant to the provisions of Fed. R. Civ. P. 30, a notice of deposition shall be served no later than fourteen (14) days before the scheduled deposition, unless a shorter period is agreed to by all

parties or ordered by the Court or the Special Master for good cause shown.

3. Scheduling by Liaison Representative

The liaison representatives for each side shall be responsible for maintaining master schedules of depositions and the accumulated number of hours of depositions used by each side. The master schedules shall contain the name of the deponent, the noticing party, and the date, time and location of the deposition. Once a deposition is scheduled, the attorney for the party noticing the deposition and the attorney for the deponent shall inform their respective side's liaison representative, who shall update the master deposition schedule. In the case of a non-party deponent, the noticing attorney shall notify the liaison representative for the other side.

4. Fact Depositions

(a) Each side shall be permitted to take 1,000 hours of fact depositions, including depositions of party and non-party deponents, to be allotted among the parties in each side's discretion. Parties may seek additional deposition hours by motion to the Court for good cause shown.

(b) Each side may take no more than 150 hours of fact depositions in each calendar month; however, multiple depositions may be noticed and scheduled for any given day.

(c) Except as noted herein, or otherwise ordered by the Court or Special Master, no deposition shall run longer than seven (7) hours on one day. While it is expected that most seven-hour depositions will begin and conclude on the same day, any seven-hour deposition may be recessed and continued to the next day by agreement of the parties or by Order of the Court or the Special Master. Up to 50 fact depositions per side may exceed the one day/seven hour limit. The party noticing the deposition must inform counsel for the deponent and the liaison for other parties of an intent to exceed the one day/seven hour limit in the Rule 30 Notice. Any party may seek a limitation on this provision from the Special Master for good cause shown by filing a motion with the Special Master no later than eight (8) days before the scheduled deposition. Any opposition to the motion must be filed no later than five (5) days before the deposition. The memoranda in support of the motion and opposition each may not exceed five (5) pages. A reply memorandum, not exceeding three (3) pages in length, may be filed no later than three (3) days before the deposition.

5. Conduct of Depositions

(a) Absent agreement of the parties or as otherwise ordered by the Court or Special Master, all fact depositions shall be conducted in accordance with Fed. R. Civ. P. 30, as amended and effective December 1, 2000.

(b) Only the time consumed during the actual questioning of a witness shall count towards the individual time limits set forth in Rule 30 and the total time limits per side as established in this Order.

(c) Except as otherwise ordered by the Court or the Special Master for good cause shown, the parties are prohibited from re-deposing any witness whose deposition has already been taken in this case; however, a party may not object to the deposition of a witness, pursuant to Fed. R. Civ. P. 30(b)(1), solely because that party has designated that witness in response to a notice of deposition pursuant to Fed. R. Civ. P. 30(b)(6).

(d) The parties shall identify any witnesses they are designating as a party representative pursuant to Fed. R. Civ. P. 30(b)(6) no later than three (3) days prior to the deposition.

(e) One attorney shall conduct the primary examination for the deposing party and only one attorney shall represent the deponent at a given time. Counsel for other parties may ask questions limited to

matters not already covered in the examination. Examination on behalf of the deposing party may be conducted by an additional attorney where such additional attorney's examination follows completion of the examination by the primary attorney and deals with matters not covered by the primary attorney. The time used by an additional attorney in actually questioning a witness shall count against that side's total hour limit.

(f) Counsel shall cooperate in the allocation of time so that deponents and counsel are not inconvenienced unnecessarily.

6. Deposition Exhibits

(a) The first time a document is used as an exhibit at a deposition, it shall be marked with the deponent's surname and a number. For example, if the deponent's name is "John Smith," the first document used as an exhibit shall be marked "Smith #1" and marked consecutively thereafter for the duration of that deposition. One copy of each exhibit shall be furnished to the opposing side at the deposition.

(b) The index of exhibits annexed to each deposition transcript shall contain the number and exhibit number for each exhibit marked for identification at the deposition and each exhibit referred to in the deposition, together with deposition page references.

7. Videotaping

In addition to having depositions stenographically recorded, any party may, without further leave of Court, notice the taking of depositions by videotape, in a notice of deposition served in this action, of any party or other witnesses on the following conditions:

- (a) Each deposition shall be stenographically transcribed and recorded by a qualified court reporter, in addition to the videotape record.
- (b) The party desiring to take a videotape deposition shall be responsible for providing all necessary equipment for the videotape recording and shall bear all costs of the videotape transcription of the deposition.
- (c) All parties to the deposition, including the operator and court reporter, shall identify themselves for the record, one after another, at the beginning of the deposition.
- (d) The swearing or affirming of the witness shall be on camera.
- (e) The camera shall, at all times, include within its field of vision, only the deponent and/or an exhibit offered into evidence. The camera shall remain stationary at all times during the deposition and shall not zoom in or out. The camera shall remain focused on

the witness and shall not videotape any other person at the deposition.

(f) In accordance with ¶ II.C.4, the portions of a videotape that record an inquiry into a matter that the party has claimed as privileged shall be redacted from the videotape pending final outcome of the privilege dispute.

(g) At the conclusion of the deposition, the original of the videotape recording shall be retained by liaison counsel for the party that noticed the deposition.

(h) The original or duplicate original videotape shall be preserved without change as filed with counsel for the party that noticed the deposition. Nothing in this Order is intended to address editing of copies of any videotapes for possible use in this case.

(i) A copy of any part or all of the videotaped deposition shall be made by, or for, any requesting party at said party's own expense.

8. Use of Depositions From Prior Cases

(a) Nothing in this Order shall be interpreted as limiting a party's ability to notice and take the deposition of any witness who has been deposed in any other case.

(b) Any party may seek a protective order to prevent the deposition of any witness who has been deposed in another case on

the grounds that the information sought would be cumulative or irrelevant, or that the deposition is unduly burdensome or designed for harassment. If a party chooses to seek a protective order, it shall file a motion, not to exceed five (5) pages, with the Special Master within seven (7) days of the initial consultation required in ¶ II.C above. The motion shall be accompanied by a certification that the moving party has produced, as of the date on which the motion was filed, all transcripts of testimony offered by the witness in another proceeding. Opposing party or parties may file a response, not to exceed five (5) pages, within seven (7) days after the filing and service of the motion, and the moving party may file a reply, not to exceed three (3) pages, within five (5) days thereafter. The scheduling of the deposition shall proceed, and notice shall be issued, and the parties shall advise the Court and Special Master of the date of the contested deposition. The Special Master may, in his discretion, hold a hearing on the matter, and shall issue a report and recommendation as soon as practicable to allow, if appropriate, the deposition to proceed as scheduled.

D. Authentication

1. Definitions

The following definitions shall be applicable to this section of the Order:

(a) “Digital documents” are all documents produced in digital formats in discovery in this case, including, but not limited to, compact disks and data tapes; or converted to digital formats in the course of complying with discovery requests in this case.

(b) “Dispositive motions” are motions that seek relief that affects a party’s claims or defenses, or which are motions, resolution of which necessitates a finding of authenticity, or an opposition to such motions.

(c) “Documents deemed authentic” are documents that are judged to be authentic through their contents or the actions of the parties to this case.

(d) “Documents presumed authentic” are all other documents.

2. Categories of Documents

(a) **Documents Deemed Authentic.** The following classes of documents are deemed authentic:

- (i) Any documents as to which the United States or a Defendant asserts or has asserted a privilege from disclosure in this case or any other.
- (ii) Any documents that were admitted into evidence in this case or any other case where the United States or any Defendants in this case were a party.
- (iii) Official transcripts of Congressional hearings.
- (iv) Final Official Reports issued by the Surgeon General of the United States.

(b) Digital Documents. Digital documents are deemed to be fair and accurate representations of the original documents from which they are derived. It is further presumed that any process or system used by the parties to transfer these documents from analog to digital, digital to analog, or digital to digital formats is reliable and produced accurate results with respect to the documents submitted in discovery in this case sufficient to satisfy Federal Rule of Evidence 901(b)(9).

3. Challenges to Authenticity

If a document is deemed authentic, its authenticity may not be challenged. If a document is presumed authentic, a party may challenge its authenticity only upon filing a dispositive motion or an

opposition thereto, and only to the extent that the resolution of the dispositive motion necessitates a determination of the authenticity of the document(s) referenced therein. A party wishing to challenge the authenticity of a document presumed authentic may do so by filing, concurrent with the filing of its dispositive motion or opposition, a separate submission, not to exceed ten (10) pages, which briefly describes the reason(s) for its challenge(s). The opposing party shall file its response, not to exceed ten (10) pages, concurrent with the filing of its responsive pleading. If an authenticity challenge is submitted concurrent with the filing of an opposition, the party making the challenge may file a reply in support of its challenge, not to exceed five (5) pages, within five (5) days of the opposing party's responsive pleading. A subsequent case management order will establish the procedure for making challenges to the authenticity of documents intended to be used during trial.

4. Other Provisions Relating to Authenticity

(a) Nothing in these procedures shall be construed as preventing a party from asserting other evidentiary objections with respect to documents deemed or presumed authentic.

(b) Nothing in these procedures shall be construed as preventing a party from objecting in any other proceeding to the authenticity of a document deemed or presumed authentic in this case.

(c) Nothing in these procedures shall be construed as not requiring a party to provide the most complete copy of a document to be deemed or presumed authentic.

E. Interrogatories

1. Plaintiff shall be permitted to propound fifty (50) “master” interrogatories (including all discrete sub-parts) to be answered separately by each Defendant. Plaintiff shall also be permitted to propound no more than twenty-five (25) “Defendant-specific” interrogatories (including all discrete sub-parts) to each Defendant separately.

2. Defendants shall be permitted to propound no more than one hundred (100) joint interrogatories (including all discrete sub-parts) to Plaintiff. Each Defendant shall also be permitted to propound no more than twenty-five (25) Defendant-specific interrogatories to Plaintiff.

3. Interrogatories served to date will be counted against the total number of interrogatories that may be served as set forth in this paragraph. The parties shall have sixty (60) days from the date of

service to respond to interrogatories, unless otherwise agreed upon by the parties or ordered by the Court or Special Master.

F. Requests for Admission

1. Plaintiff shall be permitted to propound 600 requests for admission (including all discrete sub-parts), exclusive of requests for admission seeking to establish the authenticity of documents. Defendants as a group shall be permitted to propound 500 requests for admission (including all discrete sub-parts), exclusive of requests for admission seeking to establish the authenticity of documents. Requests for admission shall be allotted among the parties in each side's discretion. The parties shall have sixty (60) days from the date of service to respond to requests for admission.

G. Privilege Logs

1. Content of Privilege Logs

When a party withholds information otherwise discoverable under the Federal Rules of Civil Procedure by claiming that it is privileged and/or subject to protection as work product, the party shall make the claim expressly, providing the following information on a privilege log:

- (a) Identification of all claims of privilege and/or work product applicable to the withholding;

(b) A description of the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties, the Court and the Special Master to evaluate the applicability of the privilege;

(c) Document date;

(d) Assigned document number;

(e) Document author(s), addressee(s), and recipients; and

(f) Identification of at least one request for production to which the withheld document is responsive.

2. No non-privileged document shall be withheld from production solely on the ground that it is attached or appended to a privileged document.

3. The privilege log shall identify all documents redacted or containing redactions by reason of privilege assertion.

4. Unless modified by agreement of the parties or otherwise ordered by the Court or Special Master, the parties shall exchange privilege logs no later than April 27, 2001, concerning all documents that are responsive to the Preliminary Requests and that have been withheld on a claim of privilege or work product protection.

5. The parties shall complete the exchange of privilege logs concerning all documents that are responsive to the Comprehensive Requests and that have been withheld on a claim of privilege or work product protection no later than ninety (90) days after the completion of production of documents from a discrete collection or site, and otherwise on a rolling basis no later than ninety (90) days after production of responsive documents.

6. For all subsequently served requests for production, the parties shall provide privilege logs no later than ninety (90) days from the date of production of documents responsive to that subsequent request. In any event, the parties shall complete the exchange of privilege logs no later than ninety (90) days after the date for completion of production of documents.

7. Parties may provide privilege logs from other cases accompanied by a certification that the privilege log satisfies the requirements of this Order, in that the privilege logs contain the information required in ¶ III.G.1(a)-(e) herein. When such logs are provided, the party submitting the log shall also provide an additional statement referring each document listed on the privilege log to at least one request for production to which the document is responsive in compliance with ¶ III.G.1(f).

8. The production of privilege logs shall be accompanied by a glossary that identifies the persons referred to in the log by name and relationship to parties in the litigation.

9. Within forty-five (45) days of entry of this Order, each party shall identify any documents it anticipates withholding based on a privilege (i) that the party has previously expressly waived, or (ii) that any court has previously ruled was waived, invalid, inapplicable, or unenforceable for any reason. With respect to such withheld documents, the party shall provide the information required by ¶ III.G.1(a)-(f) of this Order no later than forty-five (45) days after the entry of the Order. In addition, the party shall identify and provide a copy, within the same period of time, of the order or orders that held the privilege to be waived, invalid, inapplicable or unenforceable for each document as to which a party continues to assert a privilege.

10. Procedures concerning the privilege logs for the Guildford Depository shall be governed by section 4 of “Protocol for Access /Reviewed Processing/Copying of Documents Located At The Guildford Depository To Govern the United States Department of Justice and British American Tobacco (Investments) Limited for Discovery in United States of America v. Philip Morris Inc., et al.,

Civ. No. 99-2496 (GK)” executed by the Plaintiff and Defendant BATCO on November 17, 2000, and entered by the Court on November 22, 2000. BATCO shall not be required to re-log documents that are listed on those privilege logs.

H. Other Discovery-Related Matters

1. Documents Produced at Federal Records Centers

At its election, the United States shall make documents located at Federal Records Centers (hereinafter “FRCs”) which are responsive to Defendants’ document requests available for inspection “as they are kept in the usual course of business” or “shall organize and label them to correspond with the categories in the [Defendants’] requests” (Fed. R. Civ. P. 34(b)). Production of documents located at the FRCs shall be completed within the time frame for discovery mandated by this Order. Any box or series of boxes that bear the same accession number shall be construed to be a “discrete collection” as that phrase is used in the requirements for production of privilege logs set forth in ¶ III.G.5. Unless the parties agree otherwise, the United States shall make space available at the FRCs to defense counsel and staff assisting them, for the reviewing and copying of documents, with the reviewing areas permitting up to 20 individuals and the copying areas permitting up to three individuals.

The United States shall ensure that the FRCs provide adequate computer and phone outlets for defense counsel and staff assisting them, and provision shall be made for Defendants to use their own copying service in the FRCs.

2. Electronically Produced Documents

The following procedures are to be employed with respect to discovery of documents from Philip Morris Incorporated, R.J. Reynolds Tobacco Company, Lorillard Tobacco Company, Brown and Williamson Tobacco Corporation, The Tobacco Institute and The Council for Tobacco Research (collectively the “Website Defendants”) which were created prior to August 17, 1994:

(a) Website Defendants shall undertake all reasonable steps to ensure that they do not produce to the United States exact copies of any document previously provided by such Defendant on its electronic snapshot provided to Plaintiff; provided, however, that nothing in this subparagraph shall be construed as not requiring a party to produce duplicate documents that contain different marginalia, notes, or other comments at the request of a party. If, despite compliance with this subparagraph, a Website Defendant inadvertently produces exact copies of documents previously provided on its electronic “snapshot,” the Court may, upon the

conclusion of this litigation, equitably apportion costs relating to the copying of such documents.

(b) With respect to fulfillment of Defendants' discovery obligations for document discovery pre-dating August 17, 1994, each Defendant shall, no later than April 30, 2001, elect in writing to the Special Master, with copies to all parties, one of the following options:

(i) If a Defendant wishes to perform an independent, comprehensive search for documents not already provided on the electronic "snapshot" that were created prior to August 17, 1994 responsive to the United States' requests for production, it may do so, and so certify pursuant to Fed. R. Civ. P. 26(g); or

(ii) If a Defendant wishes to seek relief from these discovery obligations for documents created prior to August 17, 1994, such Website Defendant shall provide to the United States a detailed description of the location and search parameters employed to search for and produce documents created prior to August 17, 1994, that are on the Website Defendants' "snapshot," as well as a detailed description of what locations and search parameters were *not* employed to

search for and produce documents that are not on the “snapshot.” These descriptions must be sufficient to enable the United States to determine the adequacy of the pre-August 17, 1994 production as compared to the requests for production in this case, and enable the United States to determine what locations, files, employees, etc. were not searched as part of a response to a request for production that corresponds to a request in this case.

(c) Should a Defendant elect option 2(b)(ii) above, then Plaintiff, within ninety (90) days of receiving notice of such election, shall serve focused requests for production for material created prior to August 17, 1994, such requests to be based upon use of the information provided by the Website Defendants’ descriptions, and/or the United States’ independent analysis of the adequacy of the defendant’s production.

(d) Each Website Defendant shall, pursuant to and in compliance with ¶ III.G.1 and ¶ III.G.7, provide to Plaintiff privilege logs relating to any document withheld on the basis of any privilege or work product protection.

(e) No Defendant shall be permitted to rely upon the provisions of this section to curtail the search of, or withhold from production, any document created after August 17, 1994.

3. Numbering

Any party producing documents in this case shall number each such document using a Bates stamp, a computerized label, or similar numbering system that provides a unique identification number for the document and identifies the producing party. The producing party shall provide an explanation of its numbering system to assist in distinguishing documents produced by various parties. Documents made available for inspection at an FRC or at the National Archives and Records Administration (whether or not screened for privilege before or after inspection) need not be numbered as set forth in this paragraph until the selected documents are actually furnished or identified on a privilege log. The identifying number assigned to a document shall be used to identify the document for all subsequent pretrial and discovery purposes until such time as identified by an exhibit number.

4. Procedures for Identifying Redactions on Produced Documents

Where a party redacts a document on the basis of claims of privilege, work product and/or confidentiality, the party shall mark any such documents at

each place of redaction with an identifier that includes the word “REDACTED.”

5. Third Party Document Subpoenae

Any party that intends to seek documents from a non-party, pursuant to subpoena under Fed. R. Civ. P. 45, shall notify all parties of that intention and identify the documents it intends to seek no less than fourteen (14) days before serving the subpoena on the non-party. Any time a party to this litigation brings in the United States District Court for the District of Columbia a dispute over a response to or production of a third party subpoena and such dispute is randomly assigned by the Clerk of the Court to another Judge of this District Court, that party shall file, in accordance with LCvR 40.5, a “related case” memorandum informing the Judge to whom the dispute was initially assigned of the existence of this litigation and the willingness of this Court to handle the dispute.

6. Procedure to Follow When a Motion for a Protective Order or a Motion to Quash is Filed in Another District Court

Any party to this case which files or opposes, in another federal district court, a motion for a protective order, a motion to quash and/or modify a subpoena, or any other motion under Fed. R. Civ. P. 26(c) or 45(c)(3)(A) concerning discovery in this case, shall, upon filing or being served with the motion, notify that district court of the existence of this case, the

provisions of this Order, and the willingness of this Court to handle such disputes.

7. Imposition of Sanctions

In his discretion, the Special Master may recommend that the Court impose sanctions on any party for engaging in dilatory tactics, for filing frivolous motions or making frivolous arguments, or for otherwise violating the terms and/or spirit of this Order or any other Orders referred to in ¶ I.A above.

Gladys Kessler
United States District Judge

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